



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

SUCCESSION CAUSE NO.268 OF 2009

THE MATTER OF THE ESTATE OF THE LATE ALPHONCE WAMBUA NDIVO

JAMES NDIVO WAMBUA1ST APPLICANT

ALFRED MUENDO WAMBUA2ND APPLICANT

KIOKO WAMBUA3RD APPLICANT

MATATA WAMBUA4TH APPLICANT

WAYUA WAMBUA5TH APPLICANT

MULEE KISISLU6TH APPLICANT

MONICA NDULULU WAMBUA7TH APPLICANT

DOMINIC MUKUVI WAMBUA8TH APPLICANT

VERSUS

ANTONY MWAU WAMBUA.....RESPONDENT

RULING

1. The application under certificate of urgency by way of chamber summons under Sections 45 (1), 76 (b), (c), (d)(iii) of the Law of Succession Act CAP 160 and Rule 73 of the Probate and Administration Rules and dated 30th October 2018 is brought by the applicants who want the administrators to be restrained from selling, offering for sale, disposing, transferring and in any other manner interfering with the parcels of land known as Wamunyu/Kilembwa/416, Wamunyu/Kilembwa 417, Wamunyu/ Kilembwa 418, Wamunyu/Kilembwa 419 Wamunyu/Kaitha/163, Plot Number 13 in Wamunyu Market, Plot Numbers 3 and 17 in Kwa Minai Market and any other parcel of land excised from all that parcel of land previously known as Wamunyu/Kilembwa/253 or any other property belonging to the deceased. The applicants also sought that the certificate of confirmed grant issued to the administrators and confirmed on 22.2.2010 be revoked and / or annulled. The applicants seek that the title numbers Wamunyu/Kilembwa/416, 417, 418 and 419 and all other properties derived by the grant confirmed on 22.2.2010 be cancelled and the properties to revert to the original titles and reverted to the estate for fresh distribution. Further they want the court to remove the administrators and appoint other persons as it may deem fit to administer the deceased's estate.

2. The applicants explain themselves in a supporting affidavit deponed by James Ndivo Wambua that he is a son of the deceased and that the family sat down and agreed who were to represent the estate of the deceased in a succession cause and representatives were picked from each of the three houses, to wit; Anthony Mwau Wambua, Monica Ndululu Wambua and Tabitha Nundu Wambua. The deponent averred that the respondent was chosen to guide the two other representatives who were elderly and illiterate and instead kept the family in the dark as to the steps he had taken and the family was surprised to find out that the respondent had already purported to distribute the estate of the deceased. He also established that the grant that was confirmed on 22.2.2010 was revoked on 21.6.2017 after notice to show cause was issued to the petitioners. According to the deponent, the respondent went ahead to subdivide the parcel number Wamunyu/ Kilembwa/253 despite the grant having been revoked and even went ahead to file civil case 87 of 2018 to intimidate the neighbours. He averred that there was no consent for distribution of the estate of the deceased in the manner that was done. It is the case of the applicants that in obtaining 18.92 hectares of land excised from Wamunyu/ Kilembwa/253, the same was in respect of a revoked grant as the court order had not been set aside; *a fortiori*, that the titles Wamunyu/ Kilembwa/416 to 419 came about as a result of an invalid certificate of grant. The deponent averred that the respondent allocated to himself a large portion of the property and that the other properties listed in the grant are unknown to all the other beneficiaries. It is in this respect that he would like the certificate of confirmed grant revoked and the titles carved out of the deceased's properties be cancelled for fresh distribution. He attached a copy of authority to act, the certificate of confirmed grant dated 22.2.2010 and a

copy of search in respect of the mother title in the deceased's estate to support the averments.

3. In reply to the application, the respondent vide replying affidavit filed on 11.12.2018 and amended vide affidavit filed on 4.1.2019 without leave of court opposed the application. According to the respondent, the 2nd to 8th applicants are not beneficiaries and administrators in the instant cause. The respondent averred that there were two succession causes, that is 268 and 267 of 2009, and that whereas cause number 268 related to the deceased while cause number 267 related to the father of the deceased. He denied distributing the estate contrary to the wishes of the family and in the absence of consent of the beneficiaries and that the revocation of the grant on 21.6.2017 was made without notice to him and the land registry of the same and hence the administrators proceeded to subdivide the title Wamunyu/ Kilembwa/253 that culminated to issuance of titles 416 to 419. He opposed the cancellation of the said title deeds.

4. Vide supporting affidavit filed on 20.12.2018, James Ndivo Wambua averred that the assets and properties in respect of Succession causes 267 and 268 of 2009 are different. Further that that distribution was done and titles issued are not a bar to revocation.

5. The application was canvassed by way of oral submissions. Learned counsel for the applicants submitted that the respondent proceeded to have the grant confirmed without the consent of beneficiaries and after that he proceeded to allocate to himself a huge chunk of the land to the detriment of the other beneficiaries. She further submitted that the court revoked the grant but the respondent went ahead to distribute the properties of the deceased and thus the court should proceed to revoke the titles issued as a result of the actions of the respondent.

6. The respondent submitted that the family members met and agreed on the distribution of the estate of the deceased and that the revocation came at a time when the process of subdivision of the land was ongoing and thus the titles ought not to be revoked.

7. In response, learned counsel for the applicant submitted that the grant was revoked in 2017 yet the search revealed that the subdivision took place in 2018 and hence the application should be allowed.

8. The issues for determination are whether the court is barred by the doctrine of *res judicata* from revoking the grant; whether the court should grant the orders sought.

9. One of the orders sought is that of revocation of grant. The circumstances in which a grant may be revoked or annulled are set out in section 76 of the Law of Succession Act as follows:

Revocation or annulment of grant a grant of representation, whether or not confirmed, may at any time be revoked or annulled if the court decides, either on application by any interested party or of its own motion—

a.;

b. that the grant was obtained fraudulently by the making of a false statement or by the concealment from the court of something material to the case;

c.;

10. Section 7 of the Civil Procedure Act and the case of **the Independent Electoral and Boundaries Commission v Maina Kiai & 5 Others (2017) eKLR** gives prerequisites to be met for a matter to be deemed as *res judicata*, to wit;

a. The suit or issue was directly and substantially in issue in the former suit;

b. The former suit was between the same parties or parties under whom they or any claim;

c. Those parties were litigating under the same title

c. The issue was heard and determined in the former suit

d. The court that formerly heard and determined the issue was competent to try the subsequent suit or the suit in which the issue was raised.

11. Applying the test of law it is clear that prayer three cannot be granted by the court for the same is barred by the doctrine of *res judicata*. The record bears witness that on 21.6.2017 the grant was revoked and as it stands there is no order to set aside the same hence the order remains valid and proper. The court deems it unnecessary to delve into the issue of revocation of grant for there is no grant in place since the earlier one had already been revoked by the court.

12. There being no grant in place, the provisions of Sections 45 should now apply with full force. **Section 45 of the Law of Succession Act** provides:

“Except as, far as expressed authorized by this Act or by any other written Law, or by a grant of representation under this Act, no person shall, for any purpose take possession or dispose of or otherwise intermeddle with any free property of a deceased person. Any person who contravenes the provision of this section shall be guilty of an offence and liable to a fine not exceeding Ten Thousand Shillings or to a term of imprisonment not exceeding one year or to both such fine and imprisonment and be answerable to the rightful executor or administrator to the extent of the assets with which he has intermeddled after deducting any payments made in due course of administration.”

13. In interpreting the above provisions in the case of **Alexander Mutunga Wathome v Peter Lavu Tumbo & Another [2015] eKLR (Machakos Succession Cause No. 80 of 2011)** court noted that;

“In law one can only represent the estate of a deceased person when a grant of representation has been made in respect of the estate of such deceased person under the Law of Succession Act. In addition section 82 of the Law of Succession Act provides that it is the personal representative who has the powers to enforce, by suit or otherwise, all causes of action which, by virtue of any law, survive the deceased. A personal representative is defined under section 3 of the Act as the executor or administrator, as the case may be, of a deceased person.”

14. I am not satisfied that the respondent has demonstrated to the court that he had authority to handle the estate of the deceased and from the annexure in support of the application has demonstrated to this court that the respondent has been intermeddling with the estate of the deceased. As a succession court, there is a duty to preserve the assets of the deceased from wasting and to ensure that the same is distributed in accordance with the law. Therefore under **Section 47 of the Law of Succession Act** and **Rule 73 of the Probate and Administration Rules** the court has wide powers to make appropriate orders deemed appropriate in the interest of justice and for preservation of the deceased's estate.

15. The applicants have sought an order of cancellation of the titles that were issued irregularly. The power to do so was discussed in the case of **Santuzza Bilioti alias Mei Santuzza (deceased) v Giancarlo Falasconi (2014) eKLR** where the court held:

“.. the succession court has powers to order a title deed to revert to the names of a deceased person. This in effect amounts to cancellation of the title deed. Further, a succession court can order a cancellation of a title deed if a deceased's property is being fraudulently taken away by non-beneficiaries such as where the property is being sold before a grant is confirmed.”

16. In this regard I find that it is in order for the court to grant prayer 4 of the application. Prayer 5 cannot be granted because there are no administrators of the estate of the deceased in existence whether appointed by the court or otherwise. Indeed the earlier grant had already been revoked and so there are no administrators in place at the moment.

17. In the result the following orders are hereby made:

a. The title numbers Wamunyu/Kilembwa/416, 417, 418 and 419 are hereby cancelled and the same shall revert to the original title that is Wamunyu/Kilembwa/253 in the names of the deceased that shall in turn revert to the estate of the deceased for fresh distribution.

b. The parties shall sit down and agree on appointment of administrators within 60 days, failing which the court shall proceed to appoint.

c. Parties shall bear their own costs.

It is so ordered.

Dated, signed and delivered at Machakos this 4th day of July, 2019.

D.K KEMEI

JUDGE